In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The initial decision and order of the National Labor Relations Board (R.I. 45)[1] is reported at 91 NLRB 409. The initial opinion of the court below (R. I. 495) is reported at 190 F. 2d 576. The supplemental decision and order of the National

[1] The symbols "R. I." and "R. II." refer, respectively, to the Appendix to Petitioners' Brief in Case No. 10335 and Case No. 10727 in the court below.

Labor Relations Board (R. II. 49) is reported at 99 NLRB 1448. The second opinion of the court below (R. II. 878) is reported at 204 F. 2d 529.

JURISDICTION

The judgment of the court below was entered on May 28, 1953 (R. II. 890) and its supplemental decree was filed on June 26, 1953 (R. II. 891). On August 11, 1953, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Jackson until October 1, 1953, and on September 14, 1953, Mr. Justice Jackson further extended the time until October 24, 1953 (R. II. foll. p. 906). The petition for writ of certiorari was filed on October 24, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in Appendix A to the petition, pp. 25-28.

QUESTIONS PRESENTED

After an impasse had been reached in multi-employer negotiations with a union representing the employees of the various employers, the union called a strike against one of the employers in support of its economic demands. The remaining employers, anticipating an extension of the strike to them, discharged their employees in reprisal against the strike and for the purpose of discourag-

ing membership in the union. The questions presented are:

1. Whether, in the circumstances above outlined the Board may, in the exercise of its authority to prescribe such affirmative action for the redress of unfair labor practices as will effectuate the policies of the Act, award back pay to the discharged employees.

2. Whether the court below properly declined to give decisive weight to the trial examiner's conclusionary inferences of fact which the Board had declined to adopt.

STATEMENT

I. The Board's initial decision and order and the court's first opinion

A. *The facts as found by the Board in its initial decision*—Petitioners, wholesale distributors of alcoholic beverages in Chicago, Illinois, are all members of either the Illinois Wholesale Liquor Dealers Association or the Chicago Wholesale Liquor Dealers Association. Since 1943 the employment terms of the salesmen employed by each petitioner have been governed by a collective bargaining agreement entered into with Liquor and Wine Salesmen's Union, Local 62, Distillery, Rectifying and Wine Workers' International Union of America, A.F.L., herein called the Union. The contracts were negotiated annually, and after the agreement was reached, separate and identical contracts were executed between the Union and each petitioner (R. I. 46, 79-80; 236-240, 241, 242-243, 380).

Early in January 1949 the Union and petitioners commenced negotiations for a collective bargaining agreement to succeed the 1948 contract which, by its terms, was to expire on February 1, 1949 (R. I. 80; 460, 475). Near the end of January the parties reached an impasse in their negotiations on the matter of an increase in commissions for the salesmen and the deadlock continued past March 15, 1949 (R. I. 80; 460-461, 475). Later in March the Union held a meeting attended by the salesmen employed by petitioners and the Old Rose Distributing Company,[1a] and the membership voted unanimously to strike in support of the Union's demands. The strike authorization was general and was not limited to any particular petitioner. (R. I. 81; 209-210, 250.)

Rumors of the proposed strike prompted petitioners about April 1 to prepare a letter to be sent to each of the salesmen in the event of a strike against one or more of the petitioners (R.I. 81; 380-381, 383). The letter, prepared on the stationery of each individual petitioner and signed by the management, stated that petitioners had considered such a strike to be a strike against all petitioners and directed each salesman to return to his employer "immediately any records, papers, credentials or monies" which he might have in his possession and to see his employer regarding any existing financial differences (R. I. 46, 82; 467).

[1a] Old Rose, although involved in the dispute, is not for reasons hereafter stated (*infra*, p. 11, n. 4) one of the petitioners here.

The Associations informed the Union of the preparation of the dismissal letter (R.I. 362) and officials of petitioners exhibited copies of it to the salesmen (R.I. 228-229). The president of the Illinois Association, also vice-president of one of the petitioners, told a meeting of about 22 of his salesmen that if the Union struck any house, they would be "fired" and "automatically * * * get off the payroll right then" (R.I. 164); another petitioner told a union steward employed by him that "if they strike one house we will all be fired" (R.I. 181). And, according to the testimony of the president of Old Rose, the purpose of the letter was "To dismiss the salesmen in the event an attempt was made to divide and conquer by the union with respect to striking one house at a time" (R.I. 47, n. 3; 323, 311).

On April 6, the Union struck Old Rose Distributing Company, a member of the Illinois Association (R.I. 184; 231); immediately thereafter the letters were mailed to all the salesmen (R.I. 46, 83; 321-323, 364-365, 369-370, 379, 383, 467-470). Many of the salesmen, construing the letter as a notice of discharge, failed to report to work (R.I. 46; 143, 153, 159, 163, 187, 191, 195, 202, 229, 232). Those who did report were not allowed to work, in most cases being informed that they were "fired," "through," or "discharged" (R.I. 46, 83-84; 142, 152, 162, 168, 175, 178, 205). To complete their severance from employment, although commissions were usually paid on a quarterly basis, the salesmen were paid for their commissions for the period

through April 7, though this date did not terminate the quarter (R.I. 149, 154, 159, 176, 180, 187, 190, 202, 288-289). Also after some salesmen neglected to turn in the materials and monies requested in the April 7 letter, petitioners renewed the request (R.I. 468, 113, 176, 216, 289-290, R.II. 348, 369, 377-378). Early in May, the strike was settled and all the salesmen returned to work, after the Association and the Union agreed upon the terms of a new contract (R.I. 52, n. 12, 84; 127, 267-268).

B. *The Board's conclusions*—The Trial Examiner found that "the employees of Old Rose were discharged on or about April 8 and the employees of the other Respondents were locked out because of the action of the [Union] in striking Old Rose" and that "such action constitutes discrimination on the part of each Respondent against its employees." (R.I. 84.) The Board also found that all the employers violated Section 8(a)(3) and (1) of the Act, stating, "We find * * *, in agreement with the Trial Examiner, * * * that all the Respondents on or about April 8, 1949, discharged their salesmen * * *" (R.I. 50). Accordingly, the Board ordered petitioners and Old Rose to cease and desist from discouraging union membership by discriminatory alteration of employment tenure or terms or from in any other manner interfering with, restraining or coercing their employees in the exercise of rights guaranteed them by the Act (R.I. 58). The order also required petitioners and Old Rose to make whole their salesmen for any losses they incurred in their earnings by reason of their discharge, as

more specifically prescribed in the Board's decision,[2] and to post appropriate notices (R. I. 58).

C. *First proceedings in the court below*—Upon proceedings to review the Board's order, the court below in its initial decision held that in a situation where multi-employer negotiations have reached an impasse and the union strikes one of the employers with the aim of ultimately compelling all the employers to accede to its terms, the remaining employers may *lockout* their employees to counter the union's strike but may not *discharge* their employees for engaging in a strike (R.I. 504). While finding that Old Rose, the struck employer, had discharged its salesmen, and enforcing the order against it, the court was of the view that as to the remaining employers it "is not at all clear" whether and for what reasons the Board found that they discharged their employees (R.I. 505, 506). Accordingly, the court (R.I. 505-506) remanded the case to the Board, directing it to

> make a clear and explicit finding on the question whether the severance of the employer-employee relation between the various petitioners

[2] The loss in earnings, except as to Old Rose salesmen, is to be computed from the date of discharges to the date the salesmen were rehired (R. I. 87). With respect to the Old Rose strikers, the order provided that they are entitled to back pay only from the date that they may have unconditionally requested reinstatement during the strike (R. I. 58, n. 19). The difference in the back pay award is due to the fact that in the case of the Old Rose employees who were discharged after they went out on strike the loss of wages incurred by them "could not conclusively be attributed to the discharge until the employees had indicated their willingness to abandon the economic strike" (*Kallaher and Mee, Inc.*, 87 NLRB 410, 413) (R. I. 58, n. 19).

(other than Old Rose) and their respective salesmen was intended to be temporary or permanent and, if intended to be temporary in character, in view of the Board's further consideration, whether it was made for the purpose of "interfering or coercing employees in the rights guaranteed to them by Section 7" or as a legitimate exercise of petitioners' economic remedies; and, if permanent, whether, in the light of the principles announced in this opinion, a back pay award would tend to effectuate the policies of the Act.

II. The Board's supplemental decision and order and the court's second opinion

A. *The Board's supplemental findings*—Pursuant to the remand a further hearing was held before the Board at which additional evidence on both the intended duration and purpose of the severance was introduced. One of the principal witnesses called was Allen Schultz, counsel for the Chicago Association during the pre-strike period, who stated categorically and repeatedly that petitioners' "plan was definitely not to create a lockout. * * * The plan at that time was to create a legal discharge"; and that "to get as close to a discharge as possible," petitioners were to direct the salesmen to return "all of their paraphernalia, all of their books and records, and anything that had anything to do with establishing a relationship between the employer and the employee." Schultz further testified that the plan discussed contemplated "maybe not having a union and breaking the

union," stating also, with respect to the salesmen's tenure, "the thought of the organization was that maybe you could do as you pleased after the strike was over, take them back or not take them back" (R. II. 54-55; 224-225). The record further established that according to custom and practice in the industry, a direction with respect to the return of employer materials such as that contained in the April 7 letter is normally synonymous with a discharge rather than a temporary layoff (R. II. 52; 123-124, 162-163, 166, 179, 302-303, 336, 369).

Weighing all the evidence adduced in the original proceeding and in the hearing after remand, the Board concluded that "the evidence preponderates in favor of a finding that in severing their salesmen on April 7, 1949, the Petitioners intended the severance to be a permanent discharge and not a temporary layoff" (R. II. 51).[3]

In answer to the questions put by the court below in remanding the case, the Board found that (1) the severance of the employment relation between petitioners and their respective salesmen was intended to be permanent "and in reprisal for the threat of Local 62 to strike Petitioners, themselves;

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[3] The trial examiner had concluded that the severance was temporary (R. II. 82). The Board, "accepting the Trial Examiner's resolution of the credibility of witnesses, whenever such resolutions have been made, and giving due weight to his findings," reached the above conclusion, stating "In reaching this conclusion we have fully considered all of the circumstantial evidence disclosed by the record, on the basis of which the Trial Examiner reached a result different from ours. We are of the opinion, however, that these factors, considered individually or together, are outweighed by the direct evidence upon which we have relied" (R. II. 51, 57).

that it was calculated to discourage membership in, and to destroy, Local 61; * * * " (R. II. 64); (2) even if the severance were intended to be temporary, its purpose was not limited to the legitimate exercise of "economic remedies" in resisting the strike, but its purpose "was to punish the employees for the Old Rose strike and the apprehended extension of the strike to Petitioners, in order to persuade the employees of the folly of the action taken by their union, to cause disaffection from the Union, and thereby destroy that Union" (R. II. 66); and (3) a back pay award to petitioners' salesmen will effectuate the policies of the Act (R. II. 72-73). Explaining its award of back pay, the Board stated (R. I. 72-73):

> As we have found that the Petitioners intended a permanent severance of all their salesmen, not only in reprisal for the concerted activities, actual and threatened, of its salesmen, but also for the purpose of discouraging membership in, and destroying, Local 62, we perceive no reason for withholding the usual back pay remedy. To hold otherwise would be to leave inadequately redressed conduct flagrantly violative not only of the policy of the Act to protect concerted activities and the right of employees to organize and bargain collective, but also of the overriding policy of the Act to minimize interruptions to commerce. Certainly, when employees are deprived of earnings in order to defeat their exercise of protected activity, it is essential to reimburse them for the loss they have unjustly sustained. We

find, therefore, that the granting of the back pay remedy in the instant case is necessary to, and will, effectuate those policies.

Accordingly, the Board reaffirmed its original order against petitioners (R. II. 73).[4]

B. *The court's second opinion*—Upon proceedings to review the Board's supplemental decision and order the court below stated (R. II. 886):

> * * * Although two issues of fact were presented to the Board, both of which it resolved against petitioners, if either finding is adequately supported by the evidence that ends the matter. That is the further import of our prior decision.
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> We have read the entire record of the proceedings, as indeed we must to view it properly as a whole, and have concluded that the Board's finding that petitioners intended to sever permanently the employer-employee relationship at the time the April 7 letter was delivered to their employees is supported by adequate substantial evidence * * *.

The court adopted the Board's further finding that the permanent severance was "inspired by an intent to interfere with the employees' selection of a bargaining agent" (R. II. 889). These findings,

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[4] Omitting, however, Old Rose as to which the Board's original order had been previously enforced by the court below (*supra*, p. 7). Old Rose has complied with the provisions of the order directed to it.

the court stated, sufficed to support the Board's order. With respect to the provision of the order requiring petitioners to make the salesmen whole for any loss of pay caused by the discharge, the court below stated (R. II. 889):

> The question of the back pay award "is a broad discretionary one, * * * for the Board * * * not for the courts." *N.L.R.B.* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 346 * * *. Such an order must stand in the absence of a showing of a patent attempt to achieve ends other than those which fairly effectuate the policies of the Act. *Ibid.*

Thereafter, the court below entered its decree enforcing in full the Board's order (R. II. 892-893).

ARGUMENT

1. Petitioners' contention (Pet. 14-19) that the Board abused its discretion in awarding back pay to the discharged salesmen presents no question warranting review by this Court. The permanent severance of the salesmen's employment relationship on April 7, 1949, in order to defeat their exercise of protected activity, constituted, as the Board with the approval of the court below found, a discriminatory discharge in violation of Section 8(a)(3) and (1) of the Act. In these circumstances, as the Board pointed out, no reason exists for withholding the usual back pay award; to hold otherwise, and fail to reimburse employees for losses they have unjustly sustained as a result of such discharge, would be to leave inadequately redressed

conduct flagrantly violative of the policy of the Act to protect employees in the exercise of their right to engage in concerted activities. As this Court has pointed out, "In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees" *National Labor Relations Board* v. *Gullett Gin Co., Inc.*, 340 U.S. 361, 363. And "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347.

Petitioners plainly have made no showing why, if the Board's substantive findings are accepted—and petitioners on this phase of the case do not challenge them—the conventional back pay remedy should be withheld. The heart of their attack upon the back pay order is (Pet. 15, 17-18) that under the "law of the case" as set forth in the initial decision of the court below petitioners could have, without incurring liability for back pay, temporarily severed the salesmen's employment relationship; that there is no evidence that the employees suffered any greater loss of earnings because the severance was found to be permanent rather than temporary and that, therefore, there was no more justification for the Board, under the "law of the case," to award back pay in the case of a permanent severance than in the case of a temporary severance.

But this contention rests upon the clearly erroneous assumption that the court below held that a temporary severance—even if its purpose were to interfere with or coerce the employees' right to engage in protected concerted activities—would have been permissible and have afforded no basis for a back pay award. On the contrary, the court below did not hold that such a temporary severance would be lawful and hence, as petitioners assert (Pet. 15), could furnish "no possible basis for a back pay award." The court in remanding the case to the Board carefully distinguished between a temporary severance "as a legitimate exercise of petitioners' economic remedies" and one "made for the purpose of 'interfering or coercing the employees in the rights guaranteed to them by Section 7.'" (R. I. 506.) Thus, contrary to petitioners' assumption, under the principles laid down by the court below which petitioners accept as the "law of the case" (Pet. 17), even a temporary severance where motivated by a purpose not merely to resist the union's demands but also, as here, to discourage membership in the Union, affords a proper basis for the award of back pay.[5] As stated

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[5] As stated above (*supra*, p. 10), the Board upon the remand made an alternative finding that even if the severance were intended to be temporary, its purpose was not limited to the legitimate exercise of economic remedies in resisting the strike, but its purpose extended to punishing the employees for the Old Rose strike and the apprehended extension of the strike to petitioners in order to discourage membership in, and destroy the Union. The court below, in its second opinion, stated that either finding of the Board, i. e., a permanent severance for a coercive purpose or a temporary severance for a similar purpose, if adequately supported by the record, "ends

above, both the Board and the court below found that the discharge of the salesmen was inspired by such a purpose and, as the court below observed, this "ends the matter" (R. II. 885).[6]

Petitioners' further claim (Pet. 17) of inconsistency between the award of back pay to the Old Rose strikers and petitioners' salesmen overlooks the important difference in the two situations. As

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the matter" (R. II. 885). Thus, although the court in the second proceeding before it found it unnecessary to deal with the Board's alternative finding since it accepted the finding that the severance was permanent, it is clear that even on the basis of a temporary severance prompted by a coercive rather than an economic purpose, the court below would have, contrary to petitioners' assertion, sustained the back pay award.

[6] The Board's finding, approved by the court below, that the severance was "inspired by an intent to interfere with the employees' selection of a bargaining representative" (R. II. 889) removes from this case any question as to whether a discharge limited, in fact, to the same purpose as would, under the decision of the court below (R. I. 503), justify a temporary severance, i. e., to counter and resist a strike, would afford an appropriate basis for a back pay award. However, we believe that even if, contrary to the approved findings of the Board, the discharge here had been prompted by such a purpose, a back pay award might nevertheless be justified. The holding of the court below in its initial decision that it would be a legitimate exercise of economic remedies for employers to lockout employees in order to counter an apprehended extension of a strike presupposes that the severance will from the outset be expressly limited not only to the purpose of resisting the contract demands but in time to the duration of the dispute. In the case of a discharge, the employees are not informed that their severance is limited to the duration of the dispute; the ensuing controversy is thus not confined to the economic differences deadlocking the negotiations; injected into it is the issue of the employees' retention of their employment. In such circumstances, even though the discharge might be prompted by a purpose that would justify a temporary severance, it might well be concluded that a discharge represents an impermissible abuse of the employees' employment and that a back pay award is an appropriate remedy to restore the wages lost as a consequence of the discharge.

noted above (p. 5), the Old Rose strikers were discharged *after* they went on strike In that situation, where the employees are already on strike when they are discharged, it cannot be established that any loss of pay is conclusively attributable to the employer's action. Hence, the Board, as here (*supra,* p. 7, n. 2), normally computes the back pay of the strikers from the date that they make unconditional application for reinstatement. See *Kallaher and Mee, Inc.,* 87 NLRB 410. Where, however, as in the case of petitioners' salesmen, employees not on strike are discriminatorily discharged, the loss of pay stems immediately from the dismissal and is manifestly attributable to the employer's action.

For the foregoing reasons, we submit that the back pay award represents a reasonable exercise of the Board's discretion in framing a remedy to restore the wages lost through petitioners' wrongful impairment of their employees' tenure of employment.

2. Petitioners' contention (Pet. 19-23) that the court below failed to accord the trial examiner's supplemental findings the respect due to them, as prescribed by the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, is without substance. As noted above (p. 9, n. 3), the trial examiner concluded that petitioners intended only a temporary severance of employment. This conclusionary finding rested, as is evident from a reading of the examiner's report (R. I. 75-82), on the examiner's

appraisal of the objective factors favoring and opposing a finding of temporary or permanent severance.[7] The Board rejected the examiner's inference and reached the conclusion that the severance was permanent. In so doing the Board accepted the trial examiner's resolution of the credibility of witnesses "whenever such resolutions have been made" (R. II. 51). It differed with the examiner solely on the ultimate evaluation of the competing circumstances. Since the significance of an examiner's report "depends largely on the importance of credibility in the particular case" (*Universal Camera,* 340 U.S. at p. 496) and the examiner's rejected inferences in this case do not rest on his superior advantage in determining credibility they are entitled to no independent weight as a factor detracting from the Board's conclusion. "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. * * * The findings of the examiner are to be considered along with the consistency and inherent probability of testimony." *Universal Camera,* 340 U. S. at p. 496.

The court below (R. II. 881, 889) carefully noted the disagreement between the Board and the trial examiner. It accorded "the findings of the trial

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[7] Petitioners' claim (Pet. 20-21) that the examiner's inference that the severance was intended to be temporary rested to a great degree, if not entirely, upon his crediting the testimony of eleven of the petitioners to that effect at the second hearing as against the testimony of other witnesses is not borne out by the examiner's report. As the Board observed, the examiner "did not advert to this testimony [of petitioners] in his Supplemental Report." (R. II. 53, n. 6.)

examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial" (*Universal Camera*, 340 U.S. at p. 497). And upon consideration of the entire record, including the examiner's report, it concluded that the Board's findings were adequately supported (R. II. 885, 889). In this setting the decision of the court below fully comports with the principles laid down in the *Universal Camera* case.

There is no conflict in principle between the decision below and the cases cited by petitioners (Pet. 22-23). The different results in the cited cases are attributable merely to the circumstances and the particular facts of the particular case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
MARY E. WILLIAMSON,
Attorney,
National Labor Relations Board.

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LEO F. TIERNEY,
LOUIS A. KOHN,
STUART BERNSTEIN, and
FRANCIS W. COLLOPY,
Attorneys for Petitioners.

MAYER, MEYER, AUSTRIAN & PLATT,
Chicago, Illinois,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO